UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FIRST NATIONAL BANK AND TRUST COMPANY, et al., Plaintiffs, v. NATIONAL CREDIT UNION ADMINISTRATION, et al., Defendants.	Civil Action No. 90-2948 (TPJ)
AMERICAN BANKERS ASSOCIATION et al., Plaintiffs, v. NATIONAL CREDIT UNION ADMINISTRATION, et al., Defendants.	Civil Action No. 96-2312 (TPJ)

MEMORANDUM IN SUPPORT OF DEFENDANTS' JOINT MOTION FOR A STAY, OR IN THE ALTERNATIVE, A PARTIAL STAY, PENDING APPEAL OF THE COURT'S OCTOBER 25TH INJUNCTION AND PENDING SUPREME COURT REVIEW OF THE FIRST NATIONAL CASE

INTRODUCTION

On October 25, 1996, this Court issued an order preliminarily and permanently enjoining defendant National Credit Union Administration ("NCUA") and defendant-intervenors Credit Union National Association ("CUNA") and National Association of Federal Credit Unions ("NAFCU") (collectively "defendants") from authorizing federal credit unions to admit members who do not share a single common bond of occupation. Memorandum and Order

(dated October 25, 1996) ("Mem. & Ord.") at 8. On October 31, 1996, the Court clarified that this injunction not only bars the NCUA from approving new select employee groups but also "bars credit unions from enrolling new members of existing occupational groups that do not share a common occupational bond with a credit union's core membership . . ." Memorandum and Order (dated October 31, 1996) at 2-3.[1] Defendants now respectfully request that the Court stay this injunction pending both defendants' appeal of that order to the United States Court of Appeals for the District of Columbia and final disposition of the NCUA's forthcoming petition for certiorari in First Nat'l Bank and Trust Co., et al. v. NCUA (C.A. No. 90-2948) (the "First National case"), which governed this Court's consideration of the merits of plaintiffs' petition for injunctive relief. See Mem. & Ord. at 5. In the alternative, defendants request that the Court at least stay that portion of its order banning the enrollment of new members from previously approved employee groups.[2]

In the three weeks since this Court issued its October 25th order, multiple occupational credit unions and members of the public already have begun to feel the deleterious impact of the

[1] In this memorandum, defendants refer to these two orders collectively as "the October 25th order."

[2] For the Court's convenience, defendants have submitted two different, proposed orders with their motion: the first orders a complete stay, and the second orders a partial stay regarding the continued enrollment of new members.

order. With each day, credit unions turn away new members, lose capital investments, and damage their relationships with sponsoring employers. In turn, members of the public -- individuals who, until October 25th, possessed the unfettered right to join a credit union --- are left without access to affordable financial services, and many small businesses are left without a significant element of their employee benefits packages.

In light of these injuries, defendants easily satisfy the factors that justify a stay. First, the Solicitor General of the United States has authorized the filing of a petition seeking certiorari in the First National case. Because defendants will pursue their defense of the multiple group policy before the Supreme Court, plaintiffs' likelihood of success on the merits should not be deemed "a virtual certainty." See Mem. & Ord. at 5. In addition, even though this Court disagrees with defendants regarding the merits of American Bankers Ass'n, et al. v. NCUA, et al. (C.A. No. 96-2312) (the "ABA case"), defendants at the very least have presented a "serious legal question" whether injunctive relief, affecting tens of thousands of previously approved select employee groups, is barred by laches and the applicable statute of limitations. In particular, laches should preclude an injunction against the admission of new members to previously approved select employee groups, where neither these

plaintiffs nor any other plaintiffs have ever before sought this form of injunctive relief.

Second, and most critically, the balance of equities mandates a stay where, as here, only a stay will preserve the status quo and alleviate ongoing harm to the credit union industry and members of the public. Defendants provide declarations that demonstrate that an injunction that forecloses the addition of new select employee groups and/or forbids the enrollment of new members from previously approved groups does not preserve the status quo in the credit union industry. Instead, the ban condemns credit unions to atrophy as old members depart and are not replaced, as employers withdraw their sponsorship, as capital expenditures are lost, and as new loan revenue falters. Meanwhile, members of the public -- particularly low-income individuals -- who, until just three weeks ago, were eligible for membership in an occupational credit union, now are blocked from credit and financial services. Finally, even though the NCUA has taken regulatory steps that minimize injuries resulting from this Court's order, a substantial percentage of multiple occupational credit unions cannot be aided by interim, regulatory relief.

Third, a stay of the injunction would not upset the status quo for plaintiffs' member banks, who never have demonstrated that any bank is suffering significant harm due to the multiple

group policy. Indeed, even assuming that some new credit union members will have given up accounts with banks, the impact of such lost customers on any particular bank is a minimal one. The banking industry can more easily weather a stay of limited duration than the credit industry can withstand a decline in membership, employer-sponsored groups, and profits.

For these reasons, and as explained in detail below, defendants request that the Court's October 25th order be stayed, or at a minimum partially stayed, pending appeal and pending the Supreme Court's disposition of defendants' petition for certiorari in First National. In the event that certiorari is granted, defendants request that any stay remain in place until the Supreme Court issues its final ruling. Because the Solicitor General is seeking certiorari on an expedited basis, defendants hope to receive a decision from the Supreme Court during this term.

ARGUMENT

DEFENDANTS ARE ENTITLED TO A STAY PENDING APPEAL OF THE COURT'S OCTOBER 25TH INJUNCTION AND SUPREME COURT REVIEW OF THE FIRST NATIONAL CASE

In considering whether to grant a stay pending appeal, the court should consider four factors: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed

if the court grants the stay; and (4) the public interest in granting the stay." Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985) (citing Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)); accord Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

These factors are not prerequisites to be met; rather, the court should "[balance] all of the equities, focusing primary attention on the issue of irreparable harm." Chamber of Commerce v. Reich, 897 F. Supp. 570, 584 (D.D.C. 1995), rev'd on other grounds, 74 F.3d 1322 (D.C. Cir. 1996). Thus, even where a court disagrees with the moving party regarding the merits, a court may stay enforcement of its ruling if it finds that the moving party has presented a "serious legal question" and that the other three factors weigh heavily in the moving party's favor. WMATC v. Holiday Tours, 559 F.2d at 844. "An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant." Id.; see also Cuomo, 772 F.2d at 974 ("A stay may be granted with either a high probability of success and some injury, or *vice versa*."). Here, defendants are seeking Supreme Court review of the merits and also have raised at least a "serious legal question" whether laches precludes the extensive

relief sought by plaintiffs. More important, the Court's injunction will cause irreparable harm to defendants and members of the public that outweighs any "competitive" harm that plaintiffs' member banks may face. Accordingly, the balance tips decidedly in favor of a stay.

A. Defendants Have A Substantial Case On The Merits

As noted above, the Solicitor General will expeditiously seek Supreme Court review of the First National case. Therefore, although this Court relied on the D.C. Circuit's decision in First Nat'l Bank & Trust Co. v. NCUA, 90 F.3d 525 (D.C. Cir. 1996) ("NCUA II"), to conclude that plaintiffs more than likely will succeed on the merits of the consolidated First National and ABA cases, the legal viability of the multiple group policy remains a live issue. Defendants will not repeat here the arguments that they already have presented to this Court and Circuit. However, the fact that two district courts upheld the NCUA's construction of the Federal Credit Union Act ("FCUA") suggests, at the very least, that defendants have a substantial case on the merits. See First City Bank v. NCUA, 897 F. Supp. 1042 (M.D. Tenn. 1995), appeal argued, No. 95-6543 (6th Cir. Oct. 15, 1996); AT&T Family Fed. Credit Union v. First Nat'l Bank & Trust Co., 863 F. Supp. 9 (D.D.C. 1994), rev'd, NCUA II, 90 F.3d 525. NCUA's petition for certiorari also will seek review of First Nat'l Bank & Trust Co. v. NCUA, 988 F.2d 1272 (D.C. Cir.),

cert. denied, 510 U.S. 907 (1993) ("NCUA I"), which held that plaintiff banks had standing to enforce the FCUA's "common bond" requirement. Id. at 1275. That standing decision conflicts with the Fourth Circuit's decision in Branch Bank & Trust Co. v. NCUA, 786 F.2d 621 (4th Cir. 1986), cert. denied, 479 U.S. 1063 (1987). This split between circuits likewise indicates that defendants have a substantial case.

In addition, defendants have raised two, related arguments regarding the sweeping injunctive relief provided for by the October 25th order, both of which present "serious legal questions" that must be resolved on appeal. First, defendants maintain that laches bars plaintiffs' facial challenge to the multiple group policy, and thereby bars the October 25th order. Second, defendants maintain that, at a minimum, laches bars plaintiffs' claim for relief against existing select employee groups, particularly where plaintiffs have never previously sought this relief during the fourteen years since the NCUA announced the multiple group policy. Even if the D.C. Circuit does not vacate the entire October 25th order, defendants have raised a serious legal question whether the Circuit should at least vacate the portion of the order that bars credit unions from enrolling new members from existing, NCUA-approved occupational groups.

1. Laches Bars Plaintiffs' Facial Challenge to the Multiple Group Policy.

Under the doctrine of laches, an otherwise meritorious suit must be dismissed if (1) there has been unreasonable delay in bringing the claim for relief, and (2) that delay has caused prejudice. Independent Bankers Ass'n of Am. v. Heimann, 627 F.2d 486, 488 (D.C. Cir. 1980) (per curiam). Defendants maintain that this doctrine mandates dismissal of plaintiffs' belated facial challenge to the NCUA's 1982 multiple group policy.

First, although this Court found that plaintiffs did not unreasonably delay in challenging the multiple group policy because plaintiffs at first believed themselves to be without standing to oppose the policy, Mem. & Ord. at 6-7, this excuse for a fourteen-year delay finds support in neither the record nor precedent. The NCUA publicly announced the multiple group policy on April 20, 1982, 47 Fed. Reg. 16775. Moreover, the D.C. Circuit considered and rejected just such an excuse for delay in Heimann: the court explained that the Independent Bankers Association of America (a plaintiff in this proceeding as well), as a trade association, is "likely to be familiar with trends in the banking industry" and is "charged by its members with anticipating the impact of government rulings in the banking area." 627 F.2d at 488. The excuse of IBAA and its co-plaintiffs for their fourteen-year delay in bringing this case

should be treated with the same skepticism.[3] Indeed, even if plaintiffs had a valid excuse for waiting until 1990, plaintiffs offer no plausible reason for waiting further, until October, 1996, to file a facial challenge. Plaintiffs were not only aware that the First National case sought limited relief with respect to the application of the multiple group policy to one credit union, but they urged this as a reason that the district court need not consider the issue of laches.[4]

Second, although the Court concluded that plaintiffs' failure to file a facial challenge did not lead the NCUA to believe that the multiple group policy was without controversy, the record shows that this delay has greatly prejudiced the credit union industry. In reliance on the multiple group policy, numerous credit unions have expanded their select employee group

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[3] Defendants also find it implausible that plaintiffs' concern about standing delayed their bringing any challenge until 1990. In fact, in 1992, plaintiffs informed the D.C. Circuit that the district court's dismissal of their suit for lack of standing to challenge the common bond provision was a "startling departure from a long line of Supreme Court decisions" reaching back to the early 1970s. Appellant's Brief, First Nat'l Bank & Trust Co. v. NCUA Nos. 91-5262, 91-5336 (NCUA I) (dated Aug. 18, 1992).

[4] In First National, plaintiffs expressly disavowed any facial challenge to the 1982 multiple group policy. Instead, they claimed only to challenge its application since November, 1989 to approve the addition of select employee groups to AT&T Federal Credit; further, they claimed only to a seek relief that would "[declare] these actions null and void and [prevent] similar ones in the future." Pltfs. Mem. in Opp. to Defs. Mots. for Summ. Judg. (filed February 18, 1994 in C.A. No. 90-2948) at 26 n.20.

membership and have invested substantial sums to create an infrastructure to support this increased membership. See NCUA's Opp. to Mot. for TRO at 9-10 and declarations cited therein. As a result, and as discussed infra, Section B.1, these multiple group occupational credit unions already have begun to suffer losses from the Court's October 25th injunction against the policy. Again, the Heimann decision dictates that, where other institutions made "substantial financial commitments" during plaintiffs' long acquiescence, relief cannot be granted. Heimann, 627 F.2d at 488.[5]

2. Laches Bars Plaintiffs' Claim for Relief Against Existing Select Employee Groups.

In the alternative, defendants move that the Court stay the part of its order that forecloses the addition of new members to groups that the NCUA previously approved for membership in credit unions pursuant to its 1982 multiple group policy. Even if laches does not bar the entire ABA complaint (C.A. No. 96-2312), it at least bars granting this type of relief.

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[5] Even if laches did not preclude relief, the Court's injunction should be limited to the District of Columbia Circuit. see Johnson v. United States R.R. Retirement Bd., 969 F.2d 1082 (D.C. Cir. 1992), cert. denied, 507 U.S. 1029 (1993), and to select employee groups added within the six-year statute-of-limitations period. See 28 U.S.C. § 2401(a). The current situation in the Sixth Circuit starkly illustrates the need to restrict the injunction: there, a district court has upheld the multiple group policy, and the court of appeals is reviewing it. See First City Bank v. NCUA, 897 F. Supp. 1042 (M.D. Tenn. 1995), appeal argued, No. 95-6543 (6th Cir. Oct. 15, 1996).

Plaintiffs' complaint in the First National case did not seek an order enjoining the addition of new members to previously approved groups -- even with respect to the AT&T Family Federal Credit Union. The "Relief requested" in that case was limited to denying membership in additional, unrelated employee groups:

> WHEREFORE, plaintiffs request that this Court enter judgment for plaintiffs, pursuant to 5 U.S.C. § 706 and 28 U.S.C. §§ 2201 and 2202:
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> (1) Declaring that the NCUA's July 20, 1990 approval of the June 26, 1990 application for expansion of AT&T Family's field of membership is unlawful, null and void; that NCUA's June 6, 1990 approval of the April 24, 1990 application for expansion of AT&T Family's field of membership is unlawful, null and void; . . . and that the NCUA's approval of all other applications for expansion of AT&T Family's field of membership to select employee groups unrelated to the AT&T employee groups are unlawful, null and void;
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> (2) Permanently enjoining defendants from approving credit union membership or services to select employee groups unrelated to the AT&T employee group;
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> (3) Ordering defendants to pay plaintiffs' costs; and
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> (4) Granting such other relief as the Court finds just and reasonable.

Amended Complaint for Declaratory and Injunctive Relief (C.A. No. 90-2948)[6]

(..continued)

[6] Injunctive relief barring new members therefore could not have been granted in First National. Lever Brothers Co. v. United States, 981 F.2d 1330, 1338 (D.C. Cir. 1993) (injunction limited to relief specifically sought in plaintiff's complaint).

Thus, the first time any plaintiff in any case sought to bar the addition of new members to previously approved groups was on October 7, 1996, when plaintiffs here filed the ABA case (C.A. No. 96-2312), fourteen years after the NCUA announced its multiple group policy. Even if, as the Court suggested, see Mem. & Order at 7, the NCUA was put on notice in 1990 that the policy was being challenged in the First National case, neither the NCUA nor the thousands of credit unions that it regulates were on notice that relief of this type would ever be sought or granted. To the contrary, they could reasonably have expected that the worst outcome of the AT&T case would be an injunction against the addition of new, unrelated groups, as this was the most expansive relief even arguably requested in First National complaint.

Plaintiffs may contend that an injunction against adding new members to previously approved groups is a foreseeable consequence of a decision invalidating the multiple group policy. This is not correct. Even if a court invalidated the policy, it clearly would have the discretion to limit relief to a prospective injunction against adding new select employee groups. Indeed, that plaintiffs only sought relief of type in First National demonstrates the invalidating the NCUA's policy does not automatically mandate barring the enrollment of new members to previously approved groups.

Under the circumstances in this case, equity forbids granting plaintiffs an injunction against the addition of new members to previously approved groups after plaintiffs' protracted failure to seek such relief. See Heimann, 627 F.2d at 488..[7] To date, nearly 3,600 federal credit unions have relied on the policy to absorb 157,000 employee groups. See Second Declaration of David M. Marquis (filed October 9, 1996), ¶ 5. These credit unions have relied on the unchallenged continuation of their existing select employee groups and made enormous capital expenditures to serve the groups which are their constituents. As detailed in the following section, the credit unions' inability to enroll new members from existing groups will lead to both a decline in current membership levels and the loss of investments and profitability. See Section B.1, infra.

B. The NCUA, Credit Unions, and Members of the Public Will Suffer Irreparable Injury Absent A Stay

[7] Laches may act as a bar to the granting of specific types of relief as well as a bar to entire cause of action. Parties to an action and, a fortiorari, non-parties should be entitled to presume the worst outcome of litigation would be granting of all relief sought by the plaintiff. They should be permitted to order their affairs accordingly. See In re St. Johnsbury Trucking Co., 185 B.R. 687, 690 (S.D.N.Y. 1995) (delay in seeking injunctive relief "may amount to laches. In other words, delay coupled with detrimental reliance by the party against whom the relief is sought may render the relief inequitable."); cf. Garrett v. City of Hamtramck, 503 F.2d 1236, 1245-46 (6th Cir. 1974) (plaintiff's relief limited to class described in complaint).

Absent a stay of the October 25th injunction, the NCUA, the credit union industry and members of the public will suffer irreparable injury due to the effect of that order while their appeal and petitions for certiorari are pending. This is particularly true with regard to that portion of the Court's injunction that bars credit unions from enrolling new members of existing occupational groups.

1. Harm to Multiple Occupational Group Credit Unions.

Over the past fourteen years, the NCUA's multiple group policy has allowed occupational credit unions to diversify their membership base and thereby has played a vital role in reducing credit union failures and consequent losses to the National Credit Union Share Insurance Fund. See, e.g., Third Declaration of David M. Marquis (attached as Exhibit 1), ¶ 5; Second Marquis Decl., ¶¶ 8-9. By adopting new employee groups, occupational credit unions have been able to withstand the vicissitudes of downsizing, plant closings, company mergers and the elimination of entire industries. See id., ¶ 9. By now foreclosing credit unions from adding such new groups, the Court's injunction will undermine what has been the NCUA's primary engine for credit union growth and stability. Third Marquis Decl., ¶ 6. Thus, even an order that freezes in place the current select employee group (or "SEG") composition of occupational credit unions, and precludes any planned expansion, threatens the continued

viability of the credit union industry. See Second Marquis Decl., ¶ 9.

The October 25th injunction, however, goes well beyond simply restricting the approval of new select employee groups based on the multiple group policy: by barring credit unions from enrolling new members from previously approved groups, the injunction will cause immediate and devastating harm to individual credit unions and, ultimately, the credit union industry as a whole. This harm is not speculative. Rather, a post-injunction NCUA survey of multiple occupational credit unions and the attached declarations from credit unions and select group employers, who already have begun to experience the impact of the Court's order, demonstrate that, without a stay, credit unions face (1) a loss of sponsors and members and (2) a loss of profitability.

First, because the injunction forbids credit unions from admitting new members from existing employee groups, many employers that sponsor these SEGs will withdraw their support from the credit unions. Employers sponsor SEGs because they consider the opportunity to join a credit union -- with its attendant access to credit and affordable financial services -- to be a significant element of their employee benefit packages.[8]

[8] See Affidavits of Betty Bogardus, J. Dalvin Avant, Jr., Gene S. Crvarich, and Milton G. Gessert, at ¶¶ 3-4, Affidavit of Mitch Wetzler, ¶ 3, and Affidavits of Nancy Crisp, John Hess, and

However, once employers cannot offer the benefit of credit union membership equally to all employees, new and old, they may feel forced to withdraw their sponsorship. See Bogardus, Gessert, Avant, & Wetzler Affs., ¶ 4; Crisp, Hess & Davis Affs., ¶ 3; Crvarich Aff., ¶ 5. Many employers find it neither practicable nor desirable to offer a benefit to some employees but not others. See id.

Furthermore, the injunction will impede the ability of credit unions to provide services for existing groups; this, in turn, also will cause a sponsoring employer to grow dissatisfied with its credit union relationship. For example, the Court's injunction already has forced one credit union, Paragon Federal Credit Union of New Jersey ("Paragon"), to cancel plans for a new branch to serve new employees at the manufacturing facility of one of its SEGs. In response, the employer, Sony Electronics, Inc., has indicated that it is considering looking elsewhere for financial services for its employees. Declaration of Richard Rays, President and CEO of Paragon (attached as Exhibit 10), ¶¶ 3-5. The injunction has at once damaged the credit union's

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L. Bill Davis at ¶¶ 2-3; see also Affidavits of Beverly Maksin, Philip Alba, Bettyanne Velez, Bradford C. Hendrick, Walter H. Bernhardson, and Mary Anderson. These affidavits, attached as Exhibits 2 through 7 and Exhibit 18, are from human resources managers and senior executives for various businesses that sponsor "select employee groups" at federal credit unions.

reputation with its sponsor and, as discussed below, caused a loss of capital investment. See id., ¶¶ 4-5.

Consequently, a freeze on membership enrollment does not preserve the status quo at federal credit unions. Instead, the injunction has ignited a process of sponsor attrition that, as a practical matter, will result in the partial divestiture of SEGs before this Court even has the opportunity to decide whether plaintiffs could ever be entitled to such drastic relief.

Second, multiple occupational credit unions that are barred from adding new members from previously approved employee groups will suffer a loss of profitability due to lost income from new loans, wasted capital investments, and stagnation of growth. Third Marquis Decl., ¶¶ 7-12. Since the Court's order, the NCUA has conducted a survey of ten percent of all multiple occupational federal credit unions. The results of this survey demonstrate that these losses are neither remote nor speculative: six percent of the surveyed credit unions reported that, due to the Court's prohibition on admitting new members, they will become unprofitable in less than six months. Id., ¶ 9. We therefore can estimate that, of the 3,586 SEG credit unions nationwide, some 215 will become unprofitable as a result of the injunction in the next six months. See id., ¶ 9; see also Rays Decl., ¶ 2 (ability to add new members from SEGs essential to Paragon's continued profitability). Thus, without at least a

partial stay, these credit unions will suffer harm before the Supreme Court could reach a decision regarding First National.[9] Moreover, as these institutions become unprofitable, some will fail at a cost to the industry's insurance fund. Third Marquis Decl., ¶ 9.[10]

Moreover, credit unions will suffer a loss of capital investment due to the injunction. Credit unions have invested substantial sums in branch offices, equipment and personnel on the assumption that new members from existing SEGs would continue to join. Third Marquis Decl., ¶ 11. The survey's sample population alone projected a loss of $243.2 million in capital investment as a result of the October 25th order. Id.[11] Again,

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[9] As stated above, defendants soon will file their petition for certiorari and hope that the Supreme Court will rule on the First National case before the close of this term in June, 1997.

[10] The cost of such insolvencies, in turn, will be borne by the entire credit union industry, which finances the Fund. For this reason, defendants again urge the Court that Fed. R. Civ. P. 65(c) requires that plaintiffs post a bond in this case. At this juncture, the record makes abundantly clear that, at the very least, credit unions and the Fund face a risk of loss due to the Court's injunction. See Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 210 (3d Cir. 1990) ("absent circumstances where there is no risk of monetary loss to the defendant, the failure of a district court to require a successful applicant to post a bond constitutes reversible error") (emphasis added).

[11] Even those multiple occupational credit unions that do not become unprofitable in the near future will suffer a loss of loan income due to the ban on new members. Third Marquis Decl., ¶ 10. Approximately $.98 billion in loans to SEG members turn over every month. Id. A credit union's inability to add new SEG members will prevent it from replacing this loan volume with new loans. NCUA calculates that SEG credit unions instead will place

the example of Paragon FCU is illustrative. Paragon invested $80,000 toward opening a new branch to service new members from Sony Electronics, Inc. Rays Decl., ¶ 4. Likewise, Paragon invested another $20,000 to install an automated teller machine to serve new employees of another sponsor, Mercedes Benz of North America. Id., ¶¶ 5-6. As a result of the Court's order, Paragon will be forced to write off both these expenditures as a loss. Id., ¶¶ 4, 6.

Finally, the addition of new members from select employee groups is a primary source of membership replacement and growth for multiple group credit unions. In fact, 37% of all SEG credit unions receive more than 50% of new membership growth through SEGs. See Third Marquis Decl., ¶ 12.[12] Redstone Federal Credit Union ("Redstone"), for example, reports that, in the previous six months, 81.8% of its membership growth was attributable to SEGs. Declaration of Gerald Edward Toland, President and CEO of

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these excess funds in lower yielding investments, which will result in an estimated monthly loss of $32.5 million for SEG credit unions.

[12] These figures do not mean, as plaintiffs might suggest, that the membership growth of credit unions necessarily occurs at the expense of plaintiffs' member banks. In fact, many low-income individuals are precluded from banking services due to high minimum balances and high fees imposed by banks. Likewise, credit unions often provide credit to low- and moderate-income individuals who have been rejected by banks. See Affidavit of Stephen Brobeck, Executive Director of Consumer Federation of America (attached to Suppl. Brf. of NAFCU), ¶¶ 4-5. Thus, there is no reason to believe that, before joining a credit union, these new members in fact were customers of any bank.

Redstone (attached as Exhibit 11), ¶ 12. Redstone projects that, without enrolling new members from SEGs, it will have to divest itself of branch offices and, in time, will become unprofitable. Id., ¶¶ 12-14. Ultimately, then, closing the door on new members will cause credit union membership to shrink. It is inevitable that some current credit union members will change jobs, retire, move away or die. As a credit union is unable to replace these members with new employees, the credit union will lose employee groups and its financial condition will deteriorate. Second Marquis Decl., ¶ 6. Those credit unions that rely most on membership replenishment from SEGS will be most vulnerable to the effects of the injunction. See Third Marquis Decl., ¶ 12.

In issuing its injunction, this Court was not convinced that the NCUA would be injured if it were restrained from approving new groups under its 1982 multiple group policy. Mem. & Ord. at 6. However, if the Court does not at least stay its order and permit the continued enrollment of members from existing SEGs, credit unions face declining profitability, lost capital investments, and the loss of existing sponsors and employee groups. These injuries would destabilize credit unions in a way that could not be corrected by future success on appeal and could not be compensated monetarily. Furthermore, the injunction against the 1982 multiple group policy imposes "a radical

departure from long-established prior policy;" accordingly, entry of a stay pending appeal will serve to preserve the status quo. Chamber of Commerce, 897 F. Supp. at 585.

2. Harm to Members of the Public Who Will Be Denied Access to Credit Union Membership and Employers Who Cannot Offer Such Membership to Employees.

Not only will credit unions suffer harm from the October 25th injunction, but the order also causes irreparable harm to members of the public. First, and most significantly, the Court's injunction has abrogated the right of new and current employees of previously approved SEGs to join a federal credit union. These employees, especially those who earn low wages, are thus deprived of the many benefits of credit union membership, including easier access to credit, favorable rates and no-fee financial services. See Crisp, Hess, & Davis Affs., ¶¶ 2-3; Gessert Aff., ¶ 3. This result is clearly not in the public interest: access to these very benefits was the driving purpose behind the creation of the federal credit union system. See NCUA I, 988 F.2d at 1274.

If this Court does not stay its injunction pending resolution of an appeal by this Circuit, tens of thousands of previously eligible consumers will be denied credit union membership each month. See Affidavit of Keith Peterson, Vice President of CUNA's Economics and Statistics Department (attached as Exhibit 12), ¶ 9. Defendants conservatively estimate that, as

a result of the injunction, 1,112 consumers are being denied access to membership in multiple group federal credit unions each calendar day. Id., ¶¶ 9-10.[13]

Moreover, denying access to credit unions will have the most severe impact on low-income SEG employees and their families, many of whom are precluded from banking services due to high fees and balance requirements imposed by banks. See Affidavit of Stephen Brobeck, Executive Director of Consumer Federation of America (attached to Suppl. Brf. of NAFCU), ¶ 4. Furthermore, banks often do not offer credit to these individuals. Id., ¶ 5. Without a credit union, these low-income individuals may have to turn to high interest finance companies or check-cashing operations or do without credit altogether. See id.[14] This harm to low-income individuals is already a reality: defendants have attached affidavits from three individuals, all of whom sought membership in the Redstone FCU based on an existing SEG affiliation and were denied membership due to this Court's order.

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[13] Anecdotal evidence supports this estimate: Redstone Federal Credit Union reports that, from the time it received notification of the Court's order until November 4th, it denied membership to approximately 184 previously eligible individuals. Toland Decl., ¶ 11.

[14] See also Affidavits of Jimmie Lee Wood, Wanda Von Cannon, Michael K. Parleir (Exhibits 9-11 to Intervenors' Opp. to Pltfs. Mot. for TRO) (employees discussing how SEG credit unions provided loans to them when banks would not); Crisp, Hess, & Davis Affs., at ¶¶ 2-3 (SEG credit unions provide loans to employees unable to obtain bank loans, as well as favorable rates and services).

Affidavits of Barbara Goodsell, Margert Wilkerson, & Michaele Basinger (attached as Exhibits 13 through 15). With incomes of less than $20,000 per year, these individuals will be forced to obtain services at other financial institutions that charge interest rates up to, and exceeding, 35%. Id., ¶ 4-5.[15]

The experience of San Antonio Federal Credit Union ("SACU"), a Texas multiple group credit union, provides another, vivid example of how members of the public, particularly low-income prospective credit union members, will suffer harm even during the pendency of defendants' appeal. For the past two years, SACU has been participating in a program to enable low-income residents in the San Antonio area to purchase affordable housing. The beneficiaries of this program, almost all of whom reside in federally-subsidized housing, are given counseling, training and, ultimately, the opportunity to join SACU and receive home financing. "However, the Court's October 25, 1996 injunction will make it impossible to continue this program." Affidavit of Jeffrey Faver, President and CEO of SACU (attached as Exhibit 17), ¶ 3. The elimination of this program will deprive low-

[15] See also Declaration of Stephen R. Punch, 1st City Savings Federal Credit Union (attached as Exhibit 16) (Court's order will restrain 1st City from serving Mexican-American businesses, many of whom are under-served by the banking industry).

income families of an opportunity to purchase their own homes.[16] Moreover, twenty-five families will suffer this harm in the next thirty days: these families have completed the requisite training and will be ready to apply for membership in SACU within that timeframe. Due to the injunction against new members, they cannot receive financing for homeownership and will remain in federally-subsidized housing. Id., ¶ 7.[17]

Not only potential credit union members suffer harm. As noted above, defendants have provided affidavits from seven employers who wish to provide the benefit of credit union membership to their employees and consider the opportunity to join a credit union to be a significant part of their benefit packages. See Bogardus, Avant, Crvarich, Gessert, & Wetzler Affs., ¶ 3; Crisp, Hess & Davis Affs., ¶ 2; Affidavit of Gail Briles (filed in C.A. No. 90-2948), ¶ 7. The availability of such credit union services as loans and automatic deductions for investment and retirement assists a business in retaining good employees. See Crvarich Aff., ¶ 4. As explained above, however, these employers seek to provide equal benefits to all of their

[16] The injunction has forced SACU to table additional plans to offer home ownership opportunities to at least 270 families. Id., ¶ 9.

[17] See also Affidavit of Larry E. Duckworth, President and CEO of OmniAmerican Federal Credit Union (attached as Exhibit 19) (describing impact of injunction on low-income community in Fort Worth, Texas).

employees. Therefore, such employers face harm from the ban on new members because they cannot offer new employees the benefit of credit union membership and because they must choose between providing disparate benefits or withdrawing their support from the credit unions.

3. The NCUA's Regulatory Modifications Cannot Prevent Substantial Harm to Credit Unions and the Public and Do Not Obviate the Need for a Stay.

To help credit unions comply fully with the Court's order while remaining economically sound, the NCUA has issued an interim final rule, Interpretive Ruling and Policy Statement (IRPS) 96-2 (attached as Exhibit A to Third Marquis Decl.), effective November 14, 1996. IRPS 96-2 will permit federal credit unions to restructure their "fields of membership" (that is, the definition of individuals eligible for membership in a given credit union) and thereby somewhat lessen the harm caused them by the October 25th injunction, while complying with the Court's order and the decision of the Court of Appeals in NCUA II.

The IRPS amends current NCUA chartering and field of membership policy in three ways. First, the agency's definition of the "occupational common bond," as used in section 109 of the FCUA, 12 U.S.C. § 1759, will be expanded to include "employment in a trade, industry, or profession." IRPS 96-2 at 3. Groups joined together with such a common occupational bond, however,

will be required to have a close nexus both in terms of industry and geographical location. For example, an occupational credit union could not be chartered to serve "all manufacturing enterprises in Seattle, Washington" but could be chartered to serve "all computer software manufacturers in Seattle." IRPS 96-2 at 3-4.

Second, the IRPS 96-2 streamlines the documentation requirements for federal credit unions that apply for charters based on a community (as opposed to occupational) common bond. IRPS 96-2 at 5.[18] These community credit unions still must meet the NCUA's longstanding community criteria by serving an area with clearly defined boundaries that is recognized as a well-defined neighborhood, community, or rural district. Id. at 5, 14-15. Under IRPS 96-2, however, certain credit unions can demonstrate that their proposed service areas constitute "well-defined" communities without submitting detailed documentation "[i]f the area to be served is in a single political jurisdiction or portion thereof, and if the population . . . does not exceed 1,000,000." Id. at 5; see also id.. at 15.[19]

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[18] See 12 U.S.C. § 1759 ("Federal Credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district.").

[19] If a credit union proposes to serve an area that is not contained within a political jurisdiction, or an entire state, or if the population of the area exceeds 1,000,000, then NCUA still

Third, the agency has authorized a subset of community charters for credit unions that serve groups within a community. This additional type of community charter (called a "group community") now is available to credit unions that wish to serve specific occupational, associational, and community groups within a well-defined neighborhood, community or rural district. IRPS 96-2 at 5-6. Both general and group community credit unions must meet the same, modified documentation requirement described above to establish that theirs is a well-defined community. Credit unions seeking a general community charter, however, must submit additional materials to establish that there is a need for their services. See id. at 5, 16.[20]

These three new policies can afford only some, limited relief to a certain number of credit unions. Because this relief cannot alleviate all, or even most, of the injunction's adverse effects, the defendants urge the Court to grant a stay, or at least a partial stay. The NCUA has preliminarily calculated that their new policies will somewhat ameliorate the situation facing approximately 55 percent of all select employee group credit unions. Third Marquis Decl., ¶ 18. Thus, the harms caused to

(..continued)
requires more detailed documentation to support charter approval. See IRPS 96-2 at 5 & 15.

[20] General community credit unions serve anyone who lives, works, worships, or goes to school in a "well-defined" community.

the remaining 45 percent of SEG credit unions (over 1600 institutions) may continue unabated.

In addition, large credit unions with many, diversified SEGs and a broader geographic distribution will receive little or no benefit from the interim policy. Third Marquis Decl., ¶ 19. These multiple occupational group credit unions have most of the assets, members, and total number of select employee groups in the industry. For example, the 158 largest SEG credit unions (which constitute four percent of all SEG credit unions) contain 45 percent of all the assets and 27 percent of all the select employee groups in SEG credit unions nationwide. Id. This means that the new policies will not prevent membership and sponsor attrition from a substantial portion of SEGs effected by the Court's order, and will not save the industry and the public from irreparable harm. See id., ¶ 20.

C. Any Harm To Plaintiffs' Member Banks Due To The Issuance Of A Stay Will Be Minimal

In contrast to the substantial harm that the NCUA, credit unions, potential members, and sponsoring employers will suffer in the absence of at least a partial stay, the issuance of a stay will not "substantially injure" plaintiffs' member banks. See Hilton, 481 U.S. at 776. At most, plaintiffs have alleged that, without preliminary relief, continued competition from SEG credit unions will erode the current customer base of their member

institutions. See Pltfs. TRO Reply Mem. at 9. Even if plaintiffs had substantiated their assertions of "competitive injury" (which defendants vigorously dispute) the continued enrollment of members from previously approved SEGs, or even the addition of new SEGs, while defendants seek appellate and Supreme Court review would scarcely impact the financial health of the American banking industry.

The relative size of this vast industry, as juxtaposed against the credit union industry, itself demonstrates how insubstantial any competition from new credit union membership could be. As of June, 1996, the assets of all federally-insured banks and thrifts totalled approximately five trillion dollars; those of all federally-insured credit unions totalled $323.7 billion, and those of federal credit unions containing select employee groups totalled $150 billion. Affidavit of Wayne Winegarden, NAFCU Staff Economist (attached to Suppl. Brf. of NAFCU), ¶ 5; Second Marquis Decl., ¶ 5.

The asset growth of the banking industry over the last fifteen years also suggests that any competitive harm will be minimal: from 1982 to 1996, the average assets of the banking industry increased $158.1 billion each year; the assets of all federal credit unions increased by $159.8 billion over this entire fifteen-year period. Id. Where, as here, the Court's injunction will, in as few as six months, cause substantial loss

of profitability and capital investment in the credit union industry, and where there is no evidence that a stay would threaten the profits of plaintiffs' members, the balance of equities favors a stay pending appeal. See United States v. Western Electric Co., 774 F. Supp. 11 (D.D.C. 1991) (stay pending appeal of order permitting regional telephone companies to participate in new market was appropriate because stay did not significantly harm regional companies, whose primary business would remain profitable); cf. WMATC v. Holiday Tours, 559 F.2d at 843 n.3 ("The mere existence of competition is not irreparable harm, in the absence of substantiation of severe economic impact.") Indeed, plaintiffs' own behavior belies any threat of real, immediate harm: where their member banks waited fourteen years to challenge the multiple group policy, they cannot now protest that a limited stay -- one that may last no longer than the remainder of the Supreme Court's term -- will cause them injury.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court's October 25th order be stayed pending appeal and pending the Supreme Court's final disposition of defendants' petition for certiorari in First National. In the alternative, defendants request that the Court stay that portion of the Order

banning the enrollment of new members from previously approved employee groups.

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